

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

REGIS INSURANCE COMPANY,)
) C.A. No. 08C-01-048 JTV
Plaintiff,)
)
v.)
)
LOBBY HOUSE, INC., d/b/a THE)
LOBBY HOUSE, KENNETH)
CAUDILL, JUSTIN FINN, RICK)
ANNIBAL, DANIEL ADAM)
BRUMBAUGH and MARK)
RAZZANO,)
)
Defendants.)

Submitted: December 12, 2008
Decided: March 30, 2009

Jennifer Hurvitz Burbine, Esq., White & Williams, Wilmington, Delaware. Attorney for Plaintiff.

Charles E. Whitehurst, Jr., Esq., Dover, Delaware. Attorney for Defendant Razzano.

Ronald G. Poliquin, Esq., Young, Malmberg & Howard, Dover, Delaware. Attorney for Defendants Lobby House, Inc., Caudill, Finn, Annibal and Brumbaugh.

Upon Consideration of Plaintiff's
Motion For Summary Judgment
GRANTED

VAUGHN, President Judge

Regis v. Lobby House, et al.
C.A. No. 08C-01-048 JTV
March 30, 2009

OPINION

This is a declaratory judgment action in which the plaintiff, Regis Insurance Company, seeks a judgment stating that it does not have a duty to defend or indemnify its insured, The Lobby House, or certain of its former employees, in a civil action pending in this Court.

FACTS

The defendants in this action are also defendants in a personal injury action pending in this Court, *Razzano v. Brumbaugh, et al.* The complaint in that case alleges that on February 5, 2006, Mark Razzano was a patron at The Lobby House bar and restaurant in Dover. It further alleges that a fight broke out between another patron, Daniel Brumbaugh, and others; that as Razzano was attempting to leave, Brumbaugh assaulted him, without provocation, causing great injury to Razzano; that The Lobby House and its employees were negligent in various ways, including the following: in taking no action to intervene in the fight, protect patrons, or contact the police; in permitting a person to remain on the premises whose conduct had become so obstreperous and aggressive that the defendants knew or should have known he was a danger to others; in failing to take suitable steps to protect patrons, including Razzano, from an aggressive and dangerous patron; in failing to halt a fight as soon as possible after it started; in tolerating disorderly conditions; in failing to provide adequate staff to police the premises; in failing to adequately train staff to prevent or intervene in attacks on patrons by other patrons; and by having a policy of locking the bar's doors when a fight began outside the doors or when an unruly patron was ejected from the bar. The complaint seeks damages against them for Razzano's

Regis v. Lobby House, et al.

C.A. No. 08C-01-048 JTV

March 30, 2009

alleged personal injuries and special damages arising from the assault, including medical expenses, lost income and lost earning capacity.

Regis had issued a policy of multi-peril general liability insurance to The Lobby House, which was in effect at the time of the fight. The policy contained an Assault and Battery Exclusion Endorsement. The relevant portions provide:

Actions and proceedings to recover damages for “bodily injury” or “property damage” or “personal injury” arising, in whole or in part, from the following are excluded from coverage and the Company is under no duty to defend or to indemnify an insured in any action or proceeding alleging such causes of action and damages:

1. Assault and [b]attery or any act or omission in connection with the prevention, suppression or results of such acts;
2. Harmful or offensive contact between or among two or more persons;
3. Apprehension of harmful or offensive contact between or among two or more persons;
4. Threats by words or deeds;

The exclusion applies regardless of the degree of culpability or intent and without regard to:

- A. Whether the acts are alleged to be by or at the instruction or at the direction of the insured, his officers, employees, agents or servants; or by any other person lawfully or otherwise on, at or near the premises owned or occupied by the insured; or by

Regis v. Lobby House, et al.

C.A. No. 08C-01-048 JTV

March 30, 2009

any other person;

B. The alleged failure of the insured or his officers, employees, agents or servants in the hiring, supervision, retention or control of any person, whether or not an officer, employee, agent or servant of the insured;

C. The alleged failure of the insured or his officers, employees, agents or servants to attempt to prevent, bar or halt any such conduct or to medically treat or obtain such treatment for any injuries or damages sustained.

Regis contends that the assault and battery exclusion endorsement excludes Razzano's claim from the policy's coverage and its duty to defend.

The defendants contend that Razzano alleges intentional and negligent tortuous conduct which goes beyond the alleged assault and battery; that defendant Caudill's alleged intentional and negligent conduct is based solely on his ownership of The Lobby House; that Razzano's allegations are improper attempts to pierce the corporate veil, which would lead to an equitable remedy, which is unrelated to the alleged assault and battery; that an allegation that The Lobby House had a policy of locking its doors if a fight started outside the bar's doors is unrelated to the assault and battery; that Razzano alleges that the defendants breached a duty to protect from reasonably foreseeable harm, which falls within the policy's coverage; that Regis' duty to defend is broader than liability coverage; that the duty to defend arises if one count or theory lies within the policy coverage; that acts by employees deemed

Regis v. Lobby House, et al.
C.A. No. 08C-01-048 JTV
March 30, 2009

intentional trigger Regis' obligation to defend even if the policy may not provide coverage for such acts; that the "Persons Insured" definition includes the employees, or at least some of them; that until it is determined whether two of the individual defendants are employees, no decision can be made about liability resulting from *respondeat superior*; that Razzano's complaint alleges vicarious liability which extends beyond the assault and battery; and that where individual liability is sought against the corporation's officers and employees, the duty to defend and indemnify arises from individual's relationships to the insured.

STANDARD OF REVIEW

Summary judgment should be rendered if the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.¹ The facts must be viewed in the light most favorable to the non-moving party.² Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.³ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.⁴

ANALYSIS

Policy language identical to that involved here has previously been considered

¹ Super. Ct. Civ. R. 56(c).

² *Guy v. Judicial Nominating Comm'n.*, 659 A.2d 777, 780 (Del. Super. Ct. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. Ct. 1994).

³ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

⁴ *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

Regis v. Lobby House, et al.
C.A. No. 08C-01-048 JTV
March 30, 2009

by the Court in *Regis Insurance Company v. Cosenza, et al.*⁵ and *Regis Insurance Company v. Graves, et al.*⁶ *Cosenza* involved an attack on a patron by another patron. *Graves* involved an attack on a patron by a bouncer. In both of those cases, the court held that the Assault and Battery exclusion applied; and that under the exclusion, Regis had no duty to defend or indemnify the insured in the underlying personal injury actions filed by the injured parties.

In this case, after having considered all of the defendants' contentions, I conclude that their effort to find a rationale under which the exclusion does not apply is unavailing. Although Razanno's specific theories of negligence or liability are not identical to those in *Regis v. Cosenza* and *Regis v. Graves*, his claims, like the ones in those cases, are fundamentally premised upon the alleged assault of which he was the victim. His claims clearly arise from circumstances falling within numbered paragraphs one, two, three and/or four of the exclusion.

For this reason, as more fully explained in *Regis v. Cosenza* and *Regis v. Graves*, the plaintiff's motion for summary judgment is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
File

⁵ 2001 WL 238150, at *3 (Del. Super. Jan. 31, 2001).

⁶ 2005 WL 273239, at *3 (Del. Super. Jan 28, 2005).